QUARTERLY REPORT

April - June 1997

The **Quarterly Report** provides information to the Indiana State Board of Education on recent judicial, legislative, and administrative decisions affecting publicly funded education. Should anyone wish to have a copy of any decision noted herein, please call Kevin C. McDowell, General Counsel, at (317) 232-6676.

In this report:

SCHOOL PRAYER

The courts employ several standards—or hybrids of several standards— when analyzing public school prayer issues in light of the Establishment Clause. The usual three-part test employed comes from Lemon v. Kurtzman, 403 U.S. 602, 91 S. Ct. 2105 (1971). The Lemon test asks whether the challenged conduct (1) has a predominantly secular purpose; (2) has a primary effect that neither advances nor inhibits religion; and (3) does not result in excessive entanglement of government with religion. There are two other standards or tests which are also employed: The "endorsement test" from County of Allegheny v. ACLU, 492 U.S. 573, 109 S. Ct. 3086 (1989), and the "coercion test" from Lee v. Weisman, 505 U.S. 577, 112 S. Ct. 2649 (1992). Government unconstitutionally endorses religion when a reasonable person would view a challenged government action as a disapproval of contrary religious choices. Unconstitutional coercion occurs when (1) government directs, (2) a formal religious exercise, (3) in such a way as to oblige the participation of objectors.

Courts have generally found that students can engage in the following forms of religious expression.

1. Individual or group prayer or religious discussion outside of organized classes or school-sponsored events.

2. Reports, homework, and artwork which reflect students' religious beliefs. See "Curriculum and Religious Beliefs," **QR** Jan. - Mar.: 96.

3. Distribution of religious literature, provided that the school generally permits students to distribute other literature not related to the school curriculum and that the religious literature is distributed in accordance with all applicable time, place, and manner restrictions. See "Distribution of Religious Materials," **QR** Jan. - Mar.: 97.

4. Display of religious symbols, articles and medals, or clothing bearing religious messages, provided the school allows students to display non-religious expressive symbols and apparel, and such apparel or display is in accordance with all applicable time, place, and manner restrictions. See "Dress Codes," **QR** July - Sep't.: 95, Oct. - Dec.: 95, July - Sep't: 96, and "Gangs," **QR** Jan. - Mar.: 96.

5. Religious activity at the secondary level as permitted by the Equal Access Act, 20 U.S.C. §4071. See "Religious Clubs," **QR** July - Sep't.: 96.

Indiana has several laws addressing voluntary religious observances. These appear as "optional curriculum" and relate to the use of school facilities (I.C. 20-10.1-7-9); admonitions to school authorities not to coerce students or faculty to attend religious observances or punish them for doing so (I.C. 20-10.1-7-10); and prayer or meditation (I.C. 20-10.1-7-11).

Parents can also request their children be excused during the school day to receive religious instruction from organizations or churches other than school officials, although such religious instruction cannot exceed 120 minutes in the aggregate in any week and attendance records must be maintained. See I.C. 20-8.1-3-22.

It is Indiana's "silent period" statute which may not pass judicial muster under current court constructions. Passed in 1975 and never amended, the statute presently reads as follows:

> **20-10.1-7-11 Voluntary religious observance; silent period**
>
> Sec.11. Voluntary Religious Observance - Silent Period. In each public school classroom, at the opening of each school day the teacher in charge may or, if directed by his governing body, shall conduct a brief period of silent prayer or meditation with the participation of all students assembled. This silent prayer or meditation is not a religious service or exercise and may not be conducted as one, but is an opportunity for silent prayer or meditation on a religious theme for those so inclined or a moment of silent reflection on the anticipated activities of the day.

There have been no legal challenges to the statute, but there are no indications schools districts have employed it either. The most recent discussion of "moment of silence" appeared in the *Indiana Education Insight (May 12, 1997),* where it was reported that the South Madison Community School Corporation will institute this fall a pilot program of 20-30 second "moments of silence" at two of its elementary schools. The "moment of silence" will be lead by administrators (rather than by teachers, as originally proposed) and is designed to "increase contemplation and reduce stress." *Cf.* Bown v. Gwinnett County (Ga.) Sch. Dist., *infa*.

Graduation Ceremonies

Graduation ceremonies are not required by Indiana law and are only addressed by regulation in terms of accessibility for students with disabilities. See 511 IAC 7-12-2(h)(7). Courts, in addressing school prayer issues, have expressed greater Establishment Clause concerns the younger the student audience. See "Prayer and Public Meetings: College Graduation Ceremonies," **QR** Jan. - Mar.: 97, where reported case law indicated that Establishment Clause concerns were not present where the students were adults and attendance was not mandatory. Adults are less reticent in leaving a ceremony where objectionable benedictions or invocations are to be offered.

For public schools, there are concerns, especially where the student audience is "coerced." This "coercion test" arose in Lee v. Weisman, 505 U.S. 577, 112 S. Ct. 2649 (1992), where the U.S. Supreme Court reviewed the practices of a Providence, Rhode Island middle school graduation ceremony. The local practice was to invite members of the clergy to give benedictions and

invocations at public middle and high school graduation ceremonies. Clergy were provided guidelines by the public schools to ensure such invocations and benedictions would be "nonsectarian." At the ceremony, the students stood for the Pledge of Allegiance and remained standing while a local rabbi provided a short, nonsectarian invocation and benediction.[1] Both the federal district court and the 1st Circuit Court of Appeals applied various portions of the three-part Lemon test in finding the prayer violative of the Establishment Clause. The Supreme Court affirmed, but expanded the Lemon test to include a "coercion" concept. Noting that the "government involvement with religious activity in this case is pervasive, to the point of creating a state-sponsored and state-directed religious exercise in a public school," 112 S. Ct. at 2655, the Supreme Court also held that such an overt religious exercise in a public school creates "subtle coercive pressures...where the student had no real alternative which would have allowed her to avoid the fact or appearance of participation." 112 S. Ct. at 2656. The court rejected the school's argument that attendance at the graduation exercise was not mandatory such that anyone offended by the prayer could leave. High School graduation ceremonies are significant occasions, the court noted. "Graduation is a time for family and those closest to the student to celebrate success and express mutual wishes of gratitude and respect, all to the end of impressing upon the young person the role that it is his or her right and duty to assume in the community and all of its diverse parts." Id., at 2659. Because such graduation ceremonies are of such momentous occasion at the high school or middle school level, no student can be said to have the voluntary opportunity to be absent.

Public pressure through the school's supervision and control of the ceremony coupled with peer pressure creates "subtle and indirect [coercion which] can be as real as any overt compulsion." Id., at 2658. Absence from such a ceremony in order to avoid prayer would "require forfeiture of those intangible benefits which have motivated the student through youth and all her high school years." Id., at 2659. "The constitution forbids the State to exact religious conformity from a student as the price of attending her own high school graduation." Id., at 2660. The Court made clear that its decision was not directed at mature adults for whom such a dilemma may not be present. Id., at 2658.

This decision was 5-4. The dissent, led by Justice Anton Scalia, disparaged the majority's use of psychological coercion as a legal test. "[I]nterior decorating is a rock-hard science compared to

---

1 As often noted, the Pledge of Allegiance contains the words "under God," which did not appear in the original version but were added comparatively recently. "Under God" was added to the Pledge in 1954. See 36 U.S.C. §172. The U.S. Supreme court has never addressed the Pledge of Allegiance in light of Establishment Clause analyses, and appears disinclined to do so. Numerous lower courts have held that reciting the Pledge of Allegiance in a public school does not violate the Establishment Clause because recital is considered patriotic and not religious. See Smith v. Denny, 280 F.Supp. 651 (E.D. Cal. 1968), appeal dismissed, 417 F.2d 614 (9th Cir. 1969); Sheldon v. Fannin, 221 F.Supp. 766 (D. Ariz. 1963); Sherman v. Comm. Consol. Sch. Dist. 21, 758 F.Supp. 1244 (N.D. Ill. 1991).

psychology practiced by amateurs," Justice Scalia wrote in dissent at 2681, finding the majority's coercion test to be "incoherent." The dissent asked rhetorically why students were not being "psychologically coerced" moments earlier when they had to stand and recite the Pledge of Allegiance with its "under God" phrase. "Logically, that ought to be the next project for the Court's bulldozer." Id., at 2682 (Justice Scalia, dissenting).

The Court, however, did not address whether student-initiated prayer could occur at high school graduation ceremonies and declined to review a circuit court opinion which found no constitutional violation even when applying the "coercion test" developed in the Lee v. Weisman opinion. This situation has spawned numerous disputes and uncertainty.

In Jones v. Clear Creek Ind. Sch. Dist., 930 F.2d 416 (5th Cir. 1991), a pre-Lee decision, the circuit court affirmed the district court's decision that the school district's resolution permitting student-led invocations and benedictions at graduation ceremonies was not unconstitutional. The resolution in question reads as follows:

> 1. The use of an invocation and/or benediction at high school graduation exercise shall rest within the discretion of the graduating senior class, with the advice and counsel of the senior class principal;
> 2. The invocation and benediction, if used, shall be given by a student volunteer; and
> 3. Consistent with the principle of equal liberty of conscience, the invocation and benediction shall be nonsectarian and nonproselytizing in nature.

The plaintiffs, graduating seniors and their parents, petitioned the U.S. Supreme Court to review the decision. During this time, the Lee decision was rendered. The U.S. Supreme Court vacated the 5th Circuit's opinion, 112 S. Ct. 3020 (1992), and remanded to the court to reconsider its opinion in light of Lee. On remand, the 5th Circuit reached the same conclusion as before: The resolution's primary effect is secular; the proscription against sectarianism does not excessively entangle government with religion; permitting nonsectarian, nonproselytizing invocations at the election of the seniors is not an endorsement of religion; and objectors are not being coerced to participate in a government-directed religious exercise. 977 F.2d 963 (5th Cir. 1992). Petitioners again sought review by the U.S. Supreme Court. However, the Supreme Court declined to review. 508 U.S. 967, 113 S. Ct. 2950 (1993).

The 5th Circuit noted that the Supreme Court's "doctrinally centered manner of resolving Establishment Clause disputes" has resulted in "accommodating a society of remarkable religious diversity." There is, nevertheless, a significant drawback. This approach "requires considerable micromanagement of government's relationship to religion as the Court decides each case by distilling fact-sensitive rules from its precedents." 977 F.2d at 965.

This approach leaves unresolved the issue of student-led prayer at graduation ceremonies. The following are examples of recent post-Lee controversies.

Student-Led Prayers Are Unconstitutional

1. Harris v. Joint Sch. Dist. No. 241, 41 F.3d 447 (9th Cir. 1994). The circuit court reversed the decision of a federal district court in Idaho, which had determined no constitutional violation under a Lee analysis where students directed the graduation ceremony and could decide whether or not there would be invocations and benedictions (and who would deliver these prayers). The circuit court determined that the ceremony was still sponsored, supervised, and controlled by the school, and attempts to disclaim responsibility were to no avail. Public officials cannot absolve themselves of responsibility by delegating their responsibilities to nongovernmental entities. The court also said that graduation ceremonies do not create public forums for protected speech, and the use of prayer to solemnize the ceremony is not a secular purpose.

2. A.C.L.U. of New Jersey v. Black Horse Pike Regional Board of Education, 84 F.3d 1471 (3rd Cir. 1996). The school board adopted a policy which would allow senior class officers to poll the graduating class to determine whether they wanted "prayer, a moment of reflection, or nothing at all." The school board acknowledged this was an issue of religion at graduation ceremonies but also argued this was a free speech issue. As in Harris, *supra*, the printed programs would carry a disclaimer notifying the public that school officials were not endorsing any views expressed at the ceremony. A poll resulted in a majority of the students selecting prayer. A class officer was selected to do so. The court rejected the referendum approach, noting that a plurality (and not an overall majority) were able to "impose their will upon...their fellow classmates." Establishment Clause decisions are not determined by the prevailing majority. "An impermissible practice cannot be transformed into a constitutionally acceptable one by putting a democratic process to an improper use." 84 F.3d at 1477. This court, as did the court in Harris, rejected the notion that graduation ceremonies are public forums for the exchange of various ideas and views. School officials can and do restrict the topics at such ceremonies. This degree of control is relevant under a Lee analysis. Four judges dissented through a separate opinion, arguing that the senior class does posses interests in exercising their free speech and free exercise rights, and that a senior class should have the "free choice to express thanks through its own prayer at a graduation ceremony." Id., at 1497.

3. Gearon v. Loudoun County Sch. Bd., 844 F.Supp. 1097 (E.D. Va. 1993). The school district, as in Harris and Black Horse, *supra*, relied heavily upon the second decision in Jones in permitting students to write and deliver religious remarks at graduation ceremonies, the avowed purpose being to "solemnize" the graduation ceremony. The court rejected the argument, holding that "a constitutional violation inherently occurs when, in a secondary school graduation setting, a prayer is offered, regardless of who

makes the decision that the prayer will be given and who authorizes the actual wording of the remarks." Id., at 1099. A graduation ceremony in a public school setting is inherently "state sponsored," and cannot be delegated through voting by the students. In addition, the state is excessively entangled with religion in this case through the school board's exhortation of students to have prayer, the school's direct role in the voting by seniors at a mandatory meeting, and the review of proposed remarks by administrators and, in some case, members of the clergy.

Student-Led Prayers Are Constitutional

1. Adler v. Dural County School Bd., 851 F.Supp. 446 (M.D. Fla. 1994). The school, relying upon its reading of the second Jones opinion, developed guidelines for its graduation ceremonies which left the decision with respect to prayer to the discretion of the graduating class. If prayer were to be offered, the students were to select a fellow student who would prepare a brief message but which would not be monitored or reviewed by school officials. The school board considered a "moment of silence," but this failed to pass by a 4-3 count. At the 17 high schools in the district, ten graduating classes opted for religious messages while seven (7) classes selected secular messages or no messages at all. The court found that the school's guidelines—and the eventual practice—had a primary secular purpose by permitting "graduation messages" which could be religious or secular but must be developed and delivered by the students themselves. Unlike the courts cited above, this court found that high school graduation ceremonies could constitute limited public fora implicating First Amendment Free Speech rights. The court also found that the school's guidelines did not create the type of psychological coercion feared by the majority in Lee. The 11th Circuit Court of Appeals refused to consider the merits of the case, finding instead that the plaintiffs had graduated and their claims were now moot. Adler v. Duval County Sch. Bd., 112 F.3d 1475 (11th Cir. 1997).[2]

This article does not address spontaneous student or audience prayer, which has occurred in several reported cases. The courts have not found the school districts liable where such spontaneous prayer occurs. This would not be the case where the "spontaneity" was a sham.

Meditation; Quiet Time

The principal case in this area is Wallace v. Jaffree, 472 U.S. 38, 105 S.Ct. 2479 (1985), which invalidated a 1981 Alabama statute authorizing a one-minute period of silence on all public schools "for meditation or voluntary prayer." The court found the statute did not satisfy the Lemon test because it did not have a secular legislative purpose but was motivated by a purpose

---

2 Not all courts would agree that mere graduation would moot such a claim. See, for example, Griffith v. Teran, 807 F.Supp. 107 (D. Kan. 1992).

to advance religion in contravention to the Establishment Clause of the First Amendment. Government must pursue a course of complete neutrality toward religion, the court wrote. However, Justice Sandra Day O'Connor, in a concurring opinion, observed that a moment-of-silence law that did not have a primary purpose of promoting prayer might pass constitutional muster. 472 U.S. at 74, 105 S.Ct. at 2499.

Justice O'Connor's opinion has now been put to the test. In Bown v. Gwinnett County School Dist., 895 F.Supp. 1564 (N.D. Ga. 1995), the court upheld the constitutionality of Georgia's "Moment of Quiet Reflection in Schools Act." The 1994 law provides for a brief period of quiet reflection for not more than 60 seconds at the beginning of every school day. There is no mention of prayer, and the Act does not penalize or deprive any rights of individuals who elect not to take part in the period of quiet reflection. The court found the Act satisfied the three-prong Lemon inquiry, and that the Act had "an explicitly secular legislative purpose" which is found in the preamble: "[I]n today's hectic society, all too few of our citizens are able to experience even a moment of quiet reflection before plunging headlong into the day's activities." At 1574. The Act also indicates that the moment of silence is for "silent reflection on the anticipated activities of the day" and the alloted time "is not intended to be and shall not be conducted as a religious service or exercise..." At 1566. It does not affect the constitutionality of the Act because some legislators voting for it were motivated by a desire to restore prayer to public schools. "The inquiry is focused on whether there is a primary secular purpose for the statute and not whether any religious purpose can be uncovered." At 1577. The court relies heavily upon Justice O'Connor's concurrence in Jaffree, finding that (1) a moment of silence is not inherently religious; and (2) a student who participates in a moment of silence need not compromise his or her beliefs because the student is left to the student's thoughts and is not compelled to listen to the prayers or thoughts of others. "It is difficult to discern a serious threat to religious liberty from a room of silent, thoughtful schoolchildren." Jaffree, 472 U.S. at 73, 105 S.Ct. At 2498 (O'Connor, J., concurring).[3]

The 11th Circuit Court of Appeals recently upheld the district court, finding that momentary silence neither advances nor inhibits religion. See Bown v. Gwinnett County School Dist., 112 F.3d 1464 (11th Cir. 1997).[4]

---

3 In Goals 2000: Educate America Act, 20 U.S.C. §6061 (1994), states and local school systems are prohibited from adopting "policies that prevent voluntary prayer and meditation in public schools."

4 It is noteworthy that 7th Circuit Court Senior Judge Richard D. Cudahy was sitting by designation on this 11th Circuit matter.

Voluntary Student Prayer

1. In Ingebretsen v. Jackson Public Sch. Dist., 864 F.Supp. 1473 (S.D. Miss. 1994), affirmed, 88 F.3d 274 (5th Cir. 1996), cert. den., 117 S.Ct. 388 (1996), the court found a Mississippi school-prayer statute constitutionally suspect. The school principal permitted students to deliver a prayer over the intercom system despite being advised by the school district's attorney that this practice, even if voluntary on the student's part, was not permitted by the U.S. Constitution or district policy. The court found that the Mississippi statute failed the three-prong Lemon test and also constituted coercion under Lee because the statute permits others besides students to offer prayers and there is no "opt out" provision which would permit students opposed to prayer to leave the room or refuse to participate. At 1487. Permitting nonsectarian, nonproselytizing student-initiated voluntary prayer at non-compulsory and compulsory student assemblies may violate Lemon and Lee, and, hence, not be in accord with the Establishment Clause of the First Amendment. At 1488. However, the court did not hold that such voluntary student-initiated prayers were constitutionally proscribed at *high school* graduation ceremonies (at 1488), although such student prayers may not be permitted at graduation ceremonies for lower grades (at 1490). The 5th circuit affirmed, but added that "[t]o the extent the School Prayer Statute allows students to choose to pray at high school graduation to solemnize that once-in-a-lifetime event, we find it constitutionally sound" under its previous decision in Jones v. Clear Creek Ind. Sch. Dist., (see "Graduation Prayer" *supra)*. 88 F.3d at 280.[5]

2. Herdahl v. Pontotoc County Sch. Dist., 887 F.Supp. 902 (N.D. Miss. 1995), 933 F.Supp. 582 (N.D. Miss. 1996). This case involves a number of issues, including intercom prayer, classroom prayers before lunch, pre-school prayer activities of a student group, Bible classes, and the use of religious videotapes. The school district permitted student clubs or organizations brief access to the public address system following morning announcements. One student group utilized this opportunity to present short devotionals, prayers, or Bible readings. Some teachers bowed their heads for the prayers and devotionals. The court rejected the school's contention that it had created a "limited public forum" or that to deny access to the religious student group would violate the Equal Access Act (see "Religious Clubs and Equal Access," **QR** July - Sep't: 96). The use of the intercom system did not make the prayer "voluntary" because the classmates were a "captive audience" coerced by circumstances to participate involuntarily in a prayer activity. The court noted that the observed fact some teachers bowed their heads

---

5 The principal, Bishop Earl Knox, was suspended by the school board for one year without pay. A divided Mississippi Supreme Court (5-3) upheld the disciplinary action, finding that the principal's disregard of the school attorney's legal advice displayed lack of professional judgment. See Board of Trustees of the Jackson Public Sch. Dist. v. Knox, 688 So.2d 778 (Miss. 1997).

was a form of coercion under Lee v. Weisman because students see teachers as role models and seek to emulate them. 933 F.Supp. at 586, note 4. However, the court did not find constitutionally infirm the religious student club's conducting of voluntary prayer services prior to school. There were adequate safeguards, including written parental permission for students in grades K-6. The court did find violations of the Establishment Clause through the use of teacher-directed classroom prayer prior to lunch. Additionally, the court noted that teaching the Bible in a public school is not *per se* a constitutional violation, but the method of doing so may be, especially where the method is not objective, is not a part of a secular educational program, and is sectarian. The court found unconstitutional the Bible class provided in the school by an outside private group who provided teachers who were members of Protestant Christian sects. The primary emphasis was religious (fundamentalist Christianity) and not social or historical. Thus, the primary effect was to advance a particular religious sect. The court also found suspect the use of religiously oriented videotapes by the American history teacher to explain the "real purpose" of Christmas and Easter. This is "impermissible religious instruction" which "crosses the wall the constitution erected between the scepter and the cross." 933 F.Supp. at 599.

In a related order, the court awarded to the plaintiff attorney fees of $134,393.55. See Herdahl v. Pontotoc County Sch. Dist., 1997 WL 292722 (N.D. Miss. 1997).

3. Chandler v. James, 958 F.Supp. 1550 (M.D. Ala. 1997) is a continuation of the legislative maneuvering in Alabama discussed in Wallace v. Jaffree, *supra*. Although the original 1977 statute, which provided for a moment of silence at the beginning of the school day, was probably constitutional, subsequent amendments in 1981 and 1982 were not. See Wallace v. Jaffree, *supra*. This case dealt with a fourth version, passed in 1993, which purported to permit student-initiated voluntary prayer at public schools during compulsory or non-compulsory school-related affairs or events, including graduation ceremonies. However, such prayers had to be "non-sectarian" and "non-proselytizing." The court struck down the statute for two main reasons: (1) It violated the private speech and religious rights of public school students by restricting their voluntary prayer to "non-sectarian" and "non-proselytizing" prayer; and (2) as in Ingebretsen, *supra*, the statute was not enacted for a secular purpose and thus violated the Establishment Clause. See 958 F.Supp. at 1563. Although the stated legislative purpose appeared neutral on its face, the only speech sought to be protected was religious speech. The Alabama attorney general admitted the law was intended to restore student prayer to public schools. 958 F.Supp. at 1564. The court noted the irony: the statute is unconstitutional because it both promotes and restricts free speech and religious rights. Id., at 1568.

PRIVILEGED COMMUNICATIONS

(Article by Dana L. Long, Legal Counsel)

Privileged communications are "those statements made by certain persons within a protected relationship such as husband-wife, attorney-client, priest-penitent and the like which the law protects from forced disclosure on the witness stand at the option of the witness client, penitent, spouse. The extent of the privilege is governed by state statutes. Fed.Evid.Rule 501." Black's Law Dictionary, Fifth Edition, St. Paul, Minn., West Publishing Co. 1979. Because privileged communications prevent the disclosure in court of relevant information that may be necessary in order to reach the truth or fairly decide a controversy, very few privileges are recognized under the law. Evidentiary privileges are generally disfavored and are therefore strictly construed. Ernst & Ernst v. Underwriters National Assurance Company, 381 N.E.2d 897 (Ind. App. 1978). No privilege exists if it is not expressly set forth in a state statute. The Indiana Legislature has created several evidentiary privileges protecting the disclosure of confidential communications. These privileges include attorney-client, physician-patient, clergyman-penitent, husband-wife, school counselor-student, psychologist-client, social worker-client, accountant-client, and news reporter.[6]

Whether a communication is deemed privileged is determined by state statute. Scroggins v. Uniden Corp. Of America, 506 N.E.2d 83, 85 (Ind. App. 1987), trans. denied. Because statutes concerning most privileges are in derogation of the common law and "prohibit the ascertainment of truth in many controversies," the courts do not extend the scope of the privilege by implication. Alder v. State, 154 N.E.2d 716, 719 (Ind. 1958).[7] In In the Matter of L.J.M., a Child Alleged to be a Delinquent Child, 473 N.E.2d 637 (Ind. App. 1985), the Indiana Court of Appeals was asked to extend the school counselor-student privilege to a caseworker at a juvenile care facility. The Court held:

> As the statute (IC 20-6.1-6-15) does not define "school counselors" we must give the term its ordinary meaning (citation omitted). Thus, the privilege would apply to

---

6 See I.C. 34-1-14-5 (attorney-client, physician-patient, clergyman-penitent, and husband-wife); I.C. 20-6.1-6-15 (school counselor-student); I.C. 25-33-1-17 (psychologist-client); I.C. 25-23.6-6-1 (social worker-client); I.C. 25-2.1-14-1 and I.C. 25-2.1-14-2 (accountant-client); and I.C. 34-3-5-1 (news reporter).

7 The courts have recognized, however, that the physician-patient privilege covers "other persons whose intervention is strictly necessary to enable the parties to communicate with each other." Springer v. Byram, 36 N.E. 361, 363 (Ind. 1893). It covers those persons "necessary for the purpose of transmitting information and aiding the physician." Doss v. State, 267 N.E.2d 385, 390 (Ind. 1971). Similarly, the attorney-client privilege extends to communications between an agent acting on behalf of attorney and the client. Brown v. State, 448 N.E.2d 10 (Ind. 1983); Hayworth v. Schilli Leasing, Inc., 644 N.E.2d 602 (Ind. App. 1994).

> counselors at all schools, both public and private, but would not include counselors at purely residential facilities. . . . We recognize that there are compelling reasons to protect disclosures made to anyone who offers counseling services. The legislature, however, has chosen to extend a privilege to only two groups of counselors, certified psychologists and school counselors. We are therefore precluded from applying either privilege to caseworkers at juvenile shelter care facilities (at 642).

A statutory privilege does not exist to protect confidential communications made to a counselor who is not a certified psychologist. Hulett v. State, 552 N.E.2d 47 (Ind. App. 1990), rehearing denied. The statutory psychologist-client privilege did not shield from discovery the file prepared by the counselor concerning a 12-year-old victim of alleged child molesting since the counselor was not a certified psychologist. The State failed to show that its interest in fostering counseling services for those in need was paramount to defendant's interest in obtaining discovery of the counselor's file to prepare his defense against his prosecution for allegedly molesting a 12-year-old child. The Court of Appeals determined that an *in camera* inspection was necessary before the trial court could exercise its discretion in ruling on defendant's motion to discover the file.

The Indiana Supreme Court addressed the applicability of the physician-patient privilege to non-physician counselors in In the Matter of C.P., a Child Alleged to be a Delinquent Child, 563 N.E.2d 1275 (Ind. 1990). Because the privilege is intended to inspire full and complete disclosure to further successful treatment by the physician, the Court found that a counselor who aids a physician is covered by the privilege. Conversely, a counselor who acts independently of a physician is not covered by the privilege. The statutory physician-patient privilege must be strictly construed, as being in derogation of common law, and the scope of the privilege is not to be extended by implication. Therefore, the girl's communications to a social worker at a community mental health center, who had provided her with therapy, diagnosis and treatment for emotional problems, were not protected by the physician-patient privilege where the social worker was the primary caregiver and merely presented his diagnosis and plan to the psychiatrist for approval. The social worker was not a "physician" within the meaning of the statutory privilege.

In Bishop v. Goins, 586 N.E.2d 905 (Ind. App. 1992), a mother petitioned for change of custody and sought the production of a counselor's records pertaining to the marital counseling of the father and his current spouse. The trial court denied the discovery request. The Court of Appeals looked to Indiana Trial Rule 26(B) to determine that discovery would be permitted of any matter which was relevant and not privileged. The Court determined that the mental health of the father's spouse was relevant, noting in a footnote that "I.C. 31-1-11.5-21(a)(6) provides that 'the mental health and physical health of all individuals involved' is a relevant factor for the trial court to consider in making a custody determination. . . ." Id. at 907, n. 3. Following the test set forth in In the Matter of C.P., a Child Alleged to be a Delinquent Child, *supra*, the Court then found that the counselor was not a psychologist and there was no evidence that any physician

participated with the marital counseling. The Court of Appeals remanded with instructions to the trial court to enter an order allowing discovery of the marital counseling records.[8]

While state statutes determine whether a communication is privileged, whether or not a privileged relationship exists which would give rise to a particular statutorily created privilege is a question of fact to be determined by the trial court.[9] Matter of C.P., 563 N.E.2d at 1279. In Darnell v. State, 674 N.E.2d 19 (Ind. App. 1996), the defendant sought to suppress certain statements he made to an emergency room nurse that were inconsistent with his later claim of self-defense. Rejecting his claim of physician-patient privilege, the Court of Appeals applied the test set forth in Matter of C.P., *supra*, and found that there was no evidence the nurse held the required degree for a physician nor that any doctor ordered the nurse to treat the defendant. While noting that all nurses work under the general supervision of a physician, the Court found that a closer degree of supervision or control by the physician must exist for the application of the physician-patient privilege. Finally, the Court noted that the statement the defendant claimed prejudiced him—that he never stabbed his attacker—was not made for purposes of diagnosis or treatment. Because the statement was not necessary for the nurse's treatment of the defendant's injuries, the statement was not privileged.[10] Darnell v. State, 674 N.E.2d at 22.

Under Indiana law, an individual may waive the right to keep privileged communications confidential either expressly or by implication. When a party to a lawsuit places his or her mental or physical condition in issue, he or she does an act which is so incompatible with the invocation of the physician-patient privilege with respect to that condition as to implicitly waive the privilege. Canfield v. Sandock, 563 N.E.2d 526, 529 (Ind. 1990). In Cua v. Morrison, 626 N.E.2d 581 (Ind. App. 1993), aff'd 636 N.E.2d 1248 (Ind. 1994), the plaintiff brought a personal injury action, and the defense requested an order requiring the plaintiff to sign a release to allow the defense attorney to interview the plaintiff's doctors *ex parte*. The trial court granted the defense

---

8 The trial court's decision was dated June 15, 1990. The Court of Appeals did note "that I.C. 16-4-8-3.1, effective July 1, 1990, would prevent the discovery of the records in this case, absent the consent of the patient or a court order, received after a hearing, showing good cause." Bishop v. Goins, 586 N.E.2d at 906, n. 1. I.C. 16-4-8 has since been repealed and the provisions re-codified in I.C. 16-39 and I.C. 16-41.

9 See also, Korff v. State, 567 N.E.2d 1146 (Ind. 1991), cert. denied, 502 U.S. 871, 112 S. Ct. 206 (1991) (a communication from an attorney to his client concerning the date, place and time of the client's court appearance is not a privileged communication); and Rode v. State, 524 N.E.2d 797 (Ind. App. 1988) (only those communications passing from one spouse to another because of the confidence resulting from their intimate marriage relationship receive protection).

10 See Corder v. State, 467 N.E.2d 409 (Ind. 1984) determining that the physician-patient privilege does not apply unless the communications are made for the purposes of treatment or diagnosis.

motion, and plaintiff appealed. The Court of Appeals reversed. While the Court determined that the physician-patient privilege is waived as soon as a patient puts the condition in issue, the limited waiver of the privilege should not be used to conduct a fishing expedition. The defense had argued that *ex parte* interviews of plaintiff's physician were necessary for fair trial preparation. The Court determined that a prohibition on *ex parte* interviews controlled the method of gathering information, not the timing of the release of the information. Id. at 585.

In a personal injury action alleging mental anguish, the trial court, without hearing, ordered the release of the plaintiff's mental health records. In reversing, the Indiana Court of Appeals determined that the "court may order the release of the patient's mental health record without the patient's consent upon the showing of good cause following a hearing under I.C. 16-39-3 or in a proceeding under I.C. 31-6, following a hearing held under the Indiana Rules of Trial Procedure. I.C. 16-39-2-8." Buford v. Flori Roberts, Inc. and Lazarus, 663 N.E.2d 1159, 1161 (Ind. App. 1996).

Privilege can be waived by making the same statements to others outside of a privileged relationship. In Thomas v. State, 656 N.E.2d 819 (Ind. App. 1995), the victim of aggravated battery argued, prior to trial, that she wished to invoke the physician-patient privilege to exclude statements she made to the emergency room physician concerning the injuries she received. The victim had also related the details of the attack to the detective investigating the case. The Court of Appeals determined that in relating the details of the attack to the detective, the victim impliedly waived the privilege with respect to statements made to the doctor pertaining to the same subject matter as was discussed with the detective.

The selling of an asset can also be a waiver of the accountant-client privilege. In First Community Bank and Trust v. Kelley, Hardesty, Smith and Company, Inc., 663 N.E.2d 218 (Ind. App. 1996), the Court of Appeals addressed the issue of whether an accounting malpractice claim may be assigned by a client of the accountant to a successor of the client. The Court determined that when a seller sells an asset that is not a claim for malpractice, he automatically waives his accountant-client privilege with respect to matters affecting the value of that asset. Id. at 222.

Some statutory privileges contain limitations. For example, the social worker-client privilege (I.C. 25-23.6-6-1) contains exceptions which include criminal proceedings involving homicide; if the communication reveals the contemplation or commission of a crime; if the client is a minor or incompetent adult and the information indicates the client was the victim of abuse or a crime; in a proceeding in which a defense of mental incompetency is raised; in a malpractice action against the social worker; and to a physician who has established a physician-patient relationship with the client. Trials for homicide, proceedings to determine mental competency, malpractice and the determination of an issue as to the validity of a document of a client are some exceptions to the statutory psychologist-client privilege (I.C. 25-33-1-17).

Even if not waived, expressly or by implication, evidentiary privileges are not absolute and may be abrogated by law. As discussed above, mental health records may be released without the consent of the client by court order, after hearing, if the court finds by a preponderance of the evidence that:

> (1) Other reasonable methods of obtaining the information are not available or would not be effective; and
>
> (2) The need for disclosure outweighs the potential harm to the patient. In weighing the potential harm to the patient, the court shall consider the impact of disclosure on the provider-patient privilege and the patient's rehabilitative process.

I.C. 16-39-3-7.

In order to reconcile I.C. 31-6-11-3 (which requires the reporting of suspected child abuse or neglect) with the physician-patient privilege, the Indiana legislature abrogated the physician-patient privilege in cases where a child is a victim of abuse or neglect. Devore v. State, 658 N.E.2d 657 (Ind. App. 1995). I.C. 31-6-11-8 provides that privileged communications between a husband and wife, health care provider and patient, social worker, clinical social worker or marriage and family therapist and client, or school counselor or school psychologist and student is not a ground for excluding evidence in any judicial proceeding resulting from a report or failure to report child abuse or neglect. However, the purpose of I.C. 31-6-11-8 may impose limits on the extent of the abrogation. In Daymude v. State, 540 N.E.2d 1263 (Ind. App. 1989), the defendant participated in court-approved family counseling as a result of a CHINS (Child in Need of Services) action. During the counseling, he disclosed information relating to alleged instances of sexual abuse leading the state to file molestation charges. In a case of first impression in Indiana, the Court found as follows:

> Clearly, confidential communications between a health care provider and his patient are abrogated to the extent that the health care provider must report all suspected or known instances of child abuse. However, to extend the abrogation statute to information disclosed during Daymude's court ordered counseling goes beyond the purpose of the statute. The statute makes no mention of prosecuting alleged abusers, and instead only discusses means to facilitate the identification of the children who need the immediate attention of child welfare professionals.

Daymude, at 1265-1266.

The statutory abrogation of privileges in the reporting of child abuse or neglect has also been held to apply in cases involving the involuntary termination of parental rights. In Shaw v. Shelby County , Dep't. of Public Welfare, 612 N.E.2d 557 (Ind. 1993), the Indiana Supreme Court held that the physician-patient privilege is not available in a proceeding to terminate parental rights. The parent had argued that because termination proceedings are separate from child abuse and neglect proceedings, the abrogation provided by I.C. 31-6-11-8 pertaining to child abuse and

neglect did not apply to termination proceedings. The Indiana Supreme Court reasoned that although the proceedings are separate, termination proceedings adopted the same procedures as CHINS proceedings and the legislative intent was to remove the physician-patient privilege from termination proceedings as well as CHINS cases. The Indiana Court of Appeals followed the reasoning of the Supreme Court to find that the social worker-client privilege did not apply in termination proceedings [Stone v. Daviess County Div. of Children and Family Serv., 656 N.E.2d 824 (Ind. App. 1995)] and that the psychologist-patient privilege is abrogated in termination proceedings [Ross v. Delaware County Dept. Of Welfare, 661 N.E.2d 1269 (Ind. App. 1996)].

ATHLETICS: PRAYER, PARITY, PUMMELING, AND THE POETIC PERSONA (No Paean, No Gain)

In "Basketball in Indiana: Savin' the Republic and Slam Dunkin' the Opposition," **QR** Jan. - Mar.: 97, I indicated I would publish a poem written by Ralph Ankenman, M.D., about Indiana basketball. Dr. Ankenman is a psychiatrist in London, Ohio. The poem was inspired by actual events while attending Indiana high school basketball games with relatives (and not by professional curiosity).[11] Because athletics play such an integral, significant role in the schools, I am employing Dr. Ankenman's poem, by permission, to frame recent issues in this area.

HOOSIER HOOPBALL
By Ralph Ankenman, M.D.

1

When I was young in my Indiana town,
There wasn't too much a-goin' on.
And the winter nights were cold and lone and tame.
But Friday would come and the buzz 'd be growin';
Th' whole town hummin' where we was goin'
To the county rival hometown basketball game.

The Chief and the Mayor and the Judge were there.
A preacher comes down to give a prayer.
The PTA moms a-sellin' their wares
To pay for the brand-new gym.

---

11 Dr. Ankenman will be the keynote speaker at the Ninth Annual Ed-Med Conference in Indianapolis on October 28, 1997. The poem has been abridged. Should you wish to have the entire text of the poem, please advise. The complete text will appear with this edition of the **Quarterly Report** at the website for the Legal Section. See http://ideanet.doe.state.in.us/legal/.

The fans'll stand for the band to play,
A teacher looks 'round so we behave,
And we all sing, "Home of the Brave."
And then the game'll begin.

It is highly unlikely the preacher's prayer was "nonsectarian" or "nonprosylitizing." Even if it were, it is unlikely to satisfy constitutional requirements. "You haven't gotta prayer" has more than one meaning if the athletic contest is hosted by a public school.

1. Jager v. Douglas County Sch. Dist., 862 F.2d 824 (11th Cir. 1989), cert. den. 490 U.S. 1090, 109 S.Ct. 2431 (1989). The Georgia public school district violated the Establishment Clause by using Protestant ministers to provide invocations prior to its football games. When Jager complained, he was lectured on Christianity.

2. Doe v. Duncanville Ind. Sch. Dist., 994 F.2d 160 (5th Cir. 1993). The Texas school district conducted prayers in its physical education classes for nearly two decades. The girls' basketball coach conducted prayer sessions before and after practices and games. The plaintiff objected to this practice, but wanted to continue to participate as a member of the girls' basketball team. The court noted that the team routinely recited the Lord's Prayer before and after games but not "*during* games, although there may be an exception for last-second, buzzer-beater shots." 994 F.2d at 162, note 2. The school offered prayer at every conceivable occasion, including graduation ceremonies (see above). The student's "history teacher taught the Biblical version of Creation." Id. See also "Evolution vs. Creationism," **QR** Oct. - Dec.: 96. Gideon Bibles were distributed to students. Id. See "Distribution of Bibles," **QR** July - Sep't.: 95. The student declined to participate in the prayers, which resulted in unpleasant recriminations from other students and spectators. Her history teacher called her "a little atheist." Id., at 163. The court granted the plaintiffs' request for a preliminary injunction to halt the various school-sponsored religious exercises. The court did eventually find that the school prayers violated the Establishment Clause. Doe v. Duncanville Ind. Sch. Dist., 70 F.3d 402 (5th Cir. 1995).

The teams run up and down the floor,
Cheerleaders jump with every score,
The coach gets mad and tries hard not to swear.
Some senior boys with their sophomore dates
Are makin' noise and comin' late,
And lettin' the whole world know they are there.

The crowd stays on till the very last score,
Then makes its way out through the door.
But win or lose, one thing's for sure:
They'll all be back next week for more.
The gym'll empty out and soon
Young Jimmy Brown, he'll clean the room,
His one good hand upon the broom.
(That's how he made the team.)

This stanza is reminiscent of James Whitcomb Riley's "The Happy Little Cripple" (1886). Fortunately, from the Hoosier Poet's time and from Dr. Ankenman's Hoosier basketball experiences, people with disabilities have gained increasing access to opportunities for active athletic participation.

1. Lambert v. West Virginia Board of Education, 447 S.E.2d 901 (W. Va. 1994). This case was discussed in "Gender Equity and Athletic Programs," **QR** Jan. - Mar.: 95 regarding the disparity between girls' and boys' basketball seasons in West Virginia. However, a separate issue in the case involved a high school student who was deaf from birth. She had difficulty understanding the coach's directions. Her parents requested a signer to assist her, but this request resulted in her dismissal from the team just before post-season tournament play. The court found the school responsible for providing the signing services. Under the Individuals with Disabilities Education Act (IDEA) and Sec. 504 of the Rehabilitation Act of 1973, students with disabilities are entitled to participate in extracurricular activities to the same extent as their peers without disabilities. In this case, the student already required the assistance of a signer in her academic pursuits. There was no need for the school to investigate further whether this service was necessary for her extracurricular endeavors.

2. Dennin v. Connecticut Interscholastic Athletic Conference, 913 F.Supp. 663 (D.Conn. 1996). A 19-year-old student with Down Syndrome sought to enjoin the enforcement of an age-limitation rule which would have prevented him from participating on his school's swim team. Because of his special needs, he spent an additional year in middle school. Participation on the swim team was specified in his individualized education program (IEP).[12] Anyone can try out for the swim team, but no one is cut. The athletic conference by-laws render ineligible a high school student who turns age 19 before September 1. The primary purposes for the rule is to prevent competitive advantages; to protect younger students; and to discourage the delaying of one's education for athletic

---

12 Analogous provisions appear at 511 IAC 7-12-2(h)(4), which require equal access for students with disabilities to school-sponsored activities, including "Athletics, including student manager positions."

purposes ("red shirting").[13] Dennin turned 19 on September 1. His times were not particularly competitive, and swimming is not a contact sport. He sought a waiver of the rule, but the conference refused. In granting the injunction, the court found that under IDEA, Sec. 504, and the Americans with Disabilities Act (ADA), Dennin was entitled to "reasonable accommodations" (waiver of the age rule) because the waiver would not fundamentally alter the athletic program or impose an undue burden. Although the age eligibility rule is neutral on its face, individual circumstances may cause its application to be discriminatory. In this case, the sole reason the student is 19 and still in school is the existence of his disability. Application of the age rule under these circumstances would violate Sec. 504 and the ADA. The Second Circuit Court of Appeals declined to review the decision because the swim season was over and the issue was moot. 94 F.3d 96 (2d Cir. 1996).

3. Pottgen v. Missouri High Sch. Athletic Assoc., 857 F.Supp. 654 (E. D. Mo. 1994), rev'd on other grounds, 40 F.3d 926 (8th Cir. 1996), applying a similar age eligibility rule, but in this case to prevent a 19-year-old disabled student from playing baseball.

4. Sandison v. Michigan High Sch. Athletic Association, 863 F.Supp. 483 (E. D. Mich. 1994), rev'd in part on other grounds, 64 F.3d 1026 (6th Cir. 1995), applying a similar rule to students with disabilities to prevent them from track and cross country competition, although the court acknowledged such disputes merit a case-by-case analysis.

5. Johnson v. Florida High School Activities Association, Inc., 899 F.Supp. 579 (M.D. Fla. 1995), applying a case-by-case analysis to an age eligibility situation in permitting a disabled student to participate in wrestling and football because, given the student's relative lack of athletic prowess and the reasons for his continuing in school till age 19, he posed no threat to other students and was not the result of an attempt to gain a competitive edge. The purpose of the rule was satisfied, and waiver would be a "reasonable accommodation."

There's many a state where I could roam,
But Indiana's still my home,
With friendly fields and softly clouded skies.
Its folks are peaceful as can be,
But when they're mad at a referee,
Then even Grandma's fur is ready to fly.

---

13 The Indiana State Board of Education requires, as a part of the accreditation process, that school districts have a policy prohibiting "red shirting." 511 IAC 6-2-1(c)(10).

I've traveled 'round to many a place,
Looked for a friend in many a face,
But never once in all my days
Did I question who I am.
My folks, they taught me right from wrong,
My town, it makes me feel at home,
My team, it puts on quite a show!
I'm a HOOSIER basketball fan!

There is more truth in the "referee" reference than one would want to admit. In the 1997 session of the Indiana General Assembly, House Bill No. 1766 would have created a Class A misdemeanor battery offense for anyone who knowingly or intentionally touched, in a rude and insolent manner, an umpire or referee during a sporting event where the sport official was engaged in discharging his responsibilities. Although the Bill did not pass, it is an indication of increasing concerns for the safety of umpires, referees, and similar officials. (The Indiana High School Athletic Assocition (IHSAA) on May 14, 1997, adopted a by-law which will levy a one-game suspension on any athlete or coach ejected from a game for unsportsmanlike conduct. The rule is effective this fall.) Although most of the altercations are instigated by unruly fans and surly athletes, there have been other unusual circumstances.

1. Guffey v. Wyatt, 18 F.3d 869 (10th Cir. 1994). Two fierce high school rivals met in the basketball championship game. The game was a heated one. A security guard perceived the situation to be worsening. With a few minutes left in the game, he approached the referee and ordered him "to start calling more fouls" and to "control the game so we can control the crowd." This exchange was decidedly unfriendly. The referee declined to follow the advice and told the security guard to get off the court. The security guard arrested the referee and took him to a separate room, although the referee did return to complete his officiating duties. The court did not accept the security officer's defense of qualified immunity when the referee sued him for various civil rights deprivations. The security guard did not have probable cause to arrest the referee when he wouldn't "call more fouls."

2. Owens v. Medrano, 915 S.W.2d 214 (Tex. App. 1996). Two Texas high schools have an intense athletic rivalry. The final basketball game of the year pitted the two rivals against each other for the district title. The visiting team won, and attempted to cut down the nets as part of their celebration. Security guards for the home team prevented this from occurring and ushered both teams out of the gym. The home team's superintendent lodged a criminal complaint against the visiting team's coach, charging him with inciting a riot. The coach was arrested. The civil rights suit followed. However, in this instance, the court granted summary judgment for the defendants.

3. Healy v. Clifton-Fine Central Sch. Dist., 658 N.Y.S.2d 740 (N.Y.A.D. 3 Dist. 1997). The

court upheld the school board's termination of a tenured teacher for "conduct unbecoming a teacher." Healy was the timekeeper at the basketball game. His son was the coach of the team. Even though the timekeeper is supposed to be neutral, Healy began berating officials for not calling enough fouls on the opposing team. Spectators asked Healy to desist, whereupon Healy went into the stands to argue, inviting one to step outside to fight. The superintendent chastised Healy for his behavior to which Healy responded with "a string of vulgarities." Healy confronted the superintendent in the parking lot, where he struck him twice in the face, knocking off the superintendent's glasses. When the superintendent bent over to retrieve his glasses, he presented Healy with an inviting target. Healy literally kicked his...well...y'know. This last indignity alone was sufficient to terminate Healy's contract, the court noted.

It is a small wonder that psychiatrists and lawyers have such an interest in sports. This is fertile ground for both professions.

Play ball!

CONTRACTING FOR EDUCATIONAL SERVICES

There is unresolved in Indiana the extent to which a public school corporation may contact for educational or academic services beyond stated statutory instances. A number of school districts have contemplated contracting with specialized providers, but have declined to do so until there is either definitive legislative action or judicial determination. There are two promising cases currently pending in the Indiana Court of Appeals which may answer this question for both local school districts and related State agencies.

1. Fireoved et al. v. Ombudsman Educational Services, Ltd., Elkhart County Education Interlocal, et al., Cause No. 20C01-9611-CP 00288 (Elkhart Circuit Court, June 16, 1997). School corporations in Elkhart County, Indiana, hired Ombudsman Educational Services, Ltd., to provide alternative educational services to students who would otherwise be expelled from school. Ombudsman is a for-profit corporation. Indiana does not require schools to operate alternative schools, although such services are encouraged. At the time of this dispute, there were no statutes specifically addressing a school corporation's ability to contract for alternative educational services although other statutes do permit contracting for specific educational services.[14] The local collective bargaining unit filed suit, challenging the legality of such a contract with a for-profit

---

14 See, for example, I.C. 20-1-6-14.1 (preschool special education services), I.C. 20-1-6- 19 (residential placements for educational reasons), and I.C. 20-8.1-6.1-6.1 (contracting with not-for-profit corporations to provide certain services which the local school corporation cannot provide).

corporation. The trial court granted summary judgment for the schools. The following are pertinent findings:

- Although I.C. 20-8.1-6.1-6.1 provides for contracting with not-for-profit corporations to provide educational services under limited circumstances, the General School Powers Act, I.C. 20-5-2-1.2, requires school corporations to "conduct" educational programs for children residing in their respective areas. "The court concludes that it is possible to conduct an educational program within any of the listed meanings of the word 'conduct' by subcontracting the services provided, if subcontracting is the method of conducting the educational offering chosen by a local school corporation." Slip Opinion, p.7, note 1.

- The School Corporation Home Rule Act, I.C. 20-5-1.5, establishes a policy for the State of Indiana that school corporations are granted "all the powers they need for the effective operation of each school corporation," except where specifically limited. I.C. 20-5-1.5-1. Slip Op., p.8.

- Under the Home Rule Act, "any doubt as to the existence of a particular power of a school corporation shall be resolved in favor of the existence of the power." I.C. 20-5-1.5-2, Id.

- Although I.C. 20-8.1-6.1-6.1 refers to not-for-profit corporations, this is not a limitation on school corporations. "The Home Rule Act states the omission of a power from a list of powers does not imply that the school corporations lack that power." Id., at 9, citing I.C. 20-5-1.5-3(c).

- "The contract with Ombudsman is not explicitly prohibited by statute nor is it explicitly granted. However, it is clear that the court cannot interpret a prohibition based on a statutory omission. As there is no express prohibition on the Indiana schools contracting with for-profit corporations, the schools may do so" under Indiana law. Id., at 10.

- A court cannot "imply a prohibition based on an omission in the powers granted to Indiana schools. The broad grant of authority to Indiana public school corporations would be undermined if prohibitions could be implied from

words not included in the plain language of the statute."[15] Id., at 12.

The teachers have appealed the trial court's decision to the Indiana Court of Appeals.

2. Fort Wayne Education Association, et al. v. Indiana Department of Education et al., No. 49A02-9703-CR-164, on appeal from Marion County Superior Court No. 7. The Fort Wayne Community School (FWCS) applied for remediation and preventive remediation funds from the state in order to provide remediation services to students who score below proficiency standards or who are at risk of falling below the state achievement standards. I.C. 20-10.1-17 *et seq.* FWCS contracted with Richard M. Milburn High School, Inc., a for-profit organization, to provide the remediation services. The local collective bargaining unit and some parents challenged the local contract and the grant approval by the Indiana Department of Education (IDOE) and the Indiana State Board of Education (ISBOE). Their challenge was the same as in Ombudsman, arguing that I.C. 20-8.1-6.1-6.1 is the only statute permitting this type of contracting, and even then the contract is limited to not-for-profit corporations. The trial court dismissed the plaintiffs' complaint for lack of standing because they did not demonstrate any real injury or personal stake in the outcome. The plaintiffs appealed to the Indiana Court of Appeals, where it is presently pending.

3. The IDOE and ISBOE, in reviewing the application from FWCS, noted that FWCS was the only one proposing to contract for services. In deciding to approve the grant, Indiana law (including the General School Powers Act and the Home Rule Act) was considered. However, they also reviewed an analogous Pennsylvania decision because there exists no Indiana case law on this matter. In School District of Wilkinsburg v. Wilkinsburg Education Assoc., 667 A.2d 5 (Pa. 1995), the Pennsylvania Supreme Court reversed the lower court's decision in favor of the collective bargaining unit, which had challenged the legality of the school district's contract with Alternative Public Schools, Inc. (APS), to operate one of the school district's troubled elementary schools. However, the court created a case-by-case analysis for such contracts, finding in this case there were sufficient reasons to

---

15 P.L. 260-1997(ss) created an Alternative Education Program Grant through amendments to I.C.20-10.1-4.6 and the addition of I.C.21-3-11. However, the statute defines "program organizer" as a public school corporation acting on its own or in cooperation with another public school corporation. I.C. 20-10.1-4.6-2.7. This would seem to render ineligible for any grant money any program not operated by a public school corporation.

> permit the contract. The Pennsylvania Supreme Court's decision in favor of granting the local school district the necessary powers to ensure educational services to its resident children was instructive for IDOE and the ISBOE. In a subsequent but related matter, the Pennsylvania Commonwealth Court found the collective bargaining unit lacked standing to challenge the decision of the Pennsylvania Department of Education in approving program alternations at the troubled elementary school operated by APS. In Wilkinsburg Education Assn. v. School Dist. of Wilkinsburg et al., 690 A.2d 1252 (Pa. Cmwlth. 1996), the court found a lack of standing because: (1) the decision of the State did not directly affect the teachers; (2) the State's function was a statutory one and not adjudicative; and (3) any subsequent actions which may affect the teachers would be the result of school district action for which there are administrative avenues for addressing grievances.

While the Pennsylvania decisions are instructive, they are not controlling. The case-by-case analysis created by the Pennsylvania Supreme Court invites legal action and provides little guidance. It is hoped the Indiana courts will make determinations for statewide applicability.

COURT JESTERS: THE BARD OF EDUCATION

There has been considerable discussion recently over fear the works of William Shakespeare are being neglected in American schools. Most Americans are unaware of the extent of Shakespeare's influence on our language [16] and literature.[17] It even appears the Bard affects the Bench.

The late New Jersey Supreme Court Justice James F. Minturn often imitated various literary styles when writing his opinions. The more mundane the case, it seemed, the more elaborate the prose. A typical example was Tricoli v. Centalanza, 126 A. 214 (N.J. 1924), a civil case involving decidedly uncivil action. The Centalanza brothers beat Tricoli with a shovel while he sat upon his doorway stoop. For this ignoble act, the Centalanza brothers were ordered to pay to Tricoli the sum of $240 in damages. To Justice Minturn, however, this was another act from *Romeo and Juliet.*

---

16 There are at least 75 cliches in everyday American usage. For a copy of the list and the origins of the sayings, ask for "Cliches from Shakespeare."

17 See, for example, *The Winter of our Discontent* by John Steinbeck, *Brave New World* by Aldous Huxley, and *Something Wicked This Way Comes* by Ray Bradbury. These titles are derived from Shakespeare's works.

> "Run away, Maestro Juan, I am going to kill you." Such was the ferocious threat that disturbed the atmosphere, not of prehistoric Mexico, where upon desolate plains the savage coyote still bays at the moon, nor yet of classic Verona, where dramatic memories of the houses of Montague and Capulet still linger to entrance the romantic wayfarer, but from the undiluted atmosphere of Bloomfield Avenue, where it winds its attractive course through the prim rococo shades of modern Montclair, which upon the day succeeding Christmas in 1923 sat like Roma immortalis upon its seven hills, and from its throne of beauty contemplated with serene satisfaction the peace and tranquillity of the modern would.
>
> The Maestro, however, with true chivalric disdain, refused to retreat, but determined at all hazards, like Horatius, to hold the bridge, or rather the stoop, upon which he stood. Like a true Roman, inoculated with the maximum percentage of American patriotism, he turned defiantly to the oncoming house of Centalanza, and proclaimed in the bellicose language of the day, "You too son of a gun."
>
> In the days of the Montague and Capulet, aristocratic rapiers and swords defended the honor of their respective houses; but in this day of popular progress the Maestro and the Centalanza sought only the plebeian defense of fists and a shovel. As a result of a triangular contest, the physician testified that the Maestro was battered "from head to buttocks"—a distribution of punishment, it may be observed, which, while it may not be entirely aesthetic in its selection of a locum tenens, was to say the least equitably administered and distributed. Indeed, so much was the Maestro battered that his daily toil lost him for 12 days, and the trial court estimated that this loss, together with his pain and suffering, and the aggravation of the trespass, entitled him to receive from the house of Centalanza $240.

Justice Minturn went on to affirm the decision of the trial court, including the amount of damages assessed against the Centalanza brothers for the beating they inflicted upon Tricoli. He summarized the affirmance with the following.

> It is contended, however, that the actual damage sustained by the Maestro was inconsequential, and that the rule, "De minimis non curat lex," applies. It must be obvious, however, that damage which to the attending physician seemed to penetrate the Maestro "from head to buttocks" may seem trivial to us as noncombatants,

> but to the Maestro it manifestly seemed otherwise, and doubtless punctured his corpus, as well as his sensibilities. Indeed, he well might declare in the language of the gallant Mercutio of Verona, concerning the extent of his wound: "It is not as wide as a church door, or as deep as a well, but 'twill serve."

The Bard of the Bench could just have easily concluded by citing a more familiar quotation by Mercutio: "A plague o' both your houses."[18]

QUOTABLE...

> "[I]n our country are evangelists and zealots of many different political, economic and religious persuasions whose fanatical conviction is that all thought is divinely classified into two kinds—that which is their own and that which is false and dangerous."
>
> Justice Robert H. Jackson, American Communications Assn. v. Douds, 339 U.S. 382, 438; 70 S.Ct. 674, 704 (1950).

UPDATES

Title I and Parochial Schools

In **QR** April - June: 95 and Oct. - Dec.: 96, the effect of Aguilar v. Felton, 473 U.S. 402, 105 S.Ct. 3232 (1985) on the delivery of Title I services was discussed. Also included in this discussion was a report that the U.S. Supreme Court may revisit its decision and reverse it. The Court, on June 23, 1997, reversed Aguilar. In Agostinia v. Felton, 117 S.Ct. 1997 (1997), the U.S. Supreme Court, again by a 5-4 count, held that supplementary instructional services under Part A of Title I of the Elementary and Secondary Education Act ("Title I") can be provided by public entities in religiously affiliated schools without violating the First Amendment's Establishment Clause. The U.S. Department of Education (USDOE) quickly advised States of the decision by a two-page memorandum dated June 27, 1997, from Gerald N. Tirozzi, Assistant Secretary for Elementary and Secondary Education. Mr. Tirozzi's memorandum emphasized that public educational agencies "may begin to implement the Court's decision as soon as practical" through consultation with private schools. However, the memorandum also advised

---

18 *Romeo and Juliet*, Act III, Scene i

that the Agostini decision does not mandate services in religiously affiliated private schools. This memorandum was followed by a July 18, 1997, official "guidance" document from the USDOE's Mary Jean LeTendre, Director of Compensatory Education Programs. This 10-page document explains the Agostini decision and its impact on Title I services. The official guidance stresses that Title 1 instructors and counselors must be public employees, and that assignment of such educators to private schools cannot be made with regard to the religious affiliation of the employee. Because both the Agostini decision and the Aguilar case it reversed addressed Title I services in New York City, these practices influence analysis of Title I services here as well. For example, in New York City, religious symbols were removed from Title I classrooms, consultations with private school teachers were limited to mutual student-related education concerns, and a publicly employed field supervisor made one unannounced visit to each teacher's classroom each month. The Title I educators were accountable only to their public school supervisors, could provide assistance only to students deemed eligible by public school officials, could not engage in "team teaching" or other cooperative instruction with private school teachers, and could not introduce any religious matter into their instruction or become involved in the religious activities of the private school. While all of these New York City practices are not mandated as a means of passing constitutional muster, they are instructive in designing service delivery models which avoid Establishment Clause entanglements. USDOE guidance also stresses that public schools are not required to provide Title I services in private schools but are permitted to do so. The document is written in a "Q. and A." format covering twenty-five (25) questions.

Parochial School Students with Disabilities

The K.R. v. Anderson Community School Corporation case continues. As reported in **QR** July - Sep't: 95, Jan. - Mar.: 96, and April - June: 96, the federal district court originally determined that the public school was obligated to provide an instructional assistant for K.R. at the parochial school she attended. The 7th Circuit Court of Appeals reversed the district court, finding that a public school had the discretion to provide the services in this fashion but was not obligated to do so in order to provide parochial school students with disabilities with genuine opportunities to participate in special education programs. On June 4, 1997, the president signed the bill reauthorizing the Individuals with Disabilities Education Act (IDEA). Sec. 612(a)(10) of the reauthorized IDEA establishes a funding balancing measure for special education services to disabled children in private/parochial schools but does not require public schools to provide these services in the private/parochial school. The new language requires that a proportionate share of federal IDEA funds be expended to provide these services. The U.S. Supreme Court granted K.R.'s writ of certiorari on June 27, 1997, and vacated the 7th Circuit's opinion at 81 F.3d 673 (7th Cir. 1996). The Supreme Court remanded the dispute to the 7th Circuit to reconsider its decision in light of the reauthorized IDEA. K.R. v. Anderson Community Sch. Corp., 117 S.Ct. 2502 (1997). The Supreme Court also granted writs in two similar cases, vacating those decisions and remanding to the respective circuit courts to engage in the same analysis. Russman by Russman v. Sobol, 85 F.3d 1050 (2nd Cir. 1996) and Fowler ex rel. Fowler v. Sedgwick Unified Sch. Dist. No. 259, 107 F.3d 797 (10th Cir. 1997), unlike the 7th Circuit, had found that

IDEA (prior to reauthorization) placed a greater burden upon public agencies to provide comparable special education and related services in private/parochial to students with disabilities unilaterally enrolled by their parents in such schools.

Freedom of Speech: Teachers

In **QR** Jan. - Mar.: 97, Dana Long wrote an article analyzing judicial decisions where the free speech rights of teachers as citizens were balanced against the public employer's responsibilities in determining whether certain teacher activities were protected exercises of First Amendment rights or unprotected personal grievances or misconduct. One subsection of Dana's article addressed "Classroom Activity." Two additional cases are worth noting.

1. Lacks v. Ferguson Reorganized Sch. Dist., 936 F.Supp. 676 (E.D. Mo. 1996). The court ordered reinstatement of an English teacher with compensation and expungement of termination references from her personnel files. The teacher had been dismissed by the school board after she had permitted students to use profanity in creative works prepared for class (e.g., poems and plays). Although school board policy prohibited student profanity, there had been unwritten exceptions granted in the past which permitted profanity in class-related activities.

2. Williams v. Concordia Parish Sch. Bd., 670 So.2d 351 (La. App. 1996). The court upheld the school board's dismissal of a teacher for willful neglect of duty for reading sexually suggestive material inappropriate for her seventh grade students and for use of profanity in the classroom.

3. Gordon v. N.C. Crime Control & Public Safety, 959 F.Supp. 284 (E.D. N.C. 1997). Gordon's free speech rights were not infringed upon when she was terminated from her trainer position at a state-operated "boot camp" academy designed to help dropouts obtain GED dipolmas. Gordon expressed privately her dissatisfaction with the alleged disproportionate disciplining of female and black students. The court held that Gordon made no more than a personal expression of dissatisfaction about the employer's alleged behavior but took no affirmative steps to raise her grievance as a matter of public concern. Private, verbal expressions of personal dissatisfaction with a school policy are not protected speech.

Religious Clubs, Equal Access, and Public Schools

In **QR** July - Sep't: 96, there was a report on the effect of the 1984 Equal Access Act, 20 U.S.C. §§4071-4074 on the growth of religious-oriented clubs at the secondary level. One reported case was Ceniceros v. Bd. of Trustees of the San Diego Unified Sch. Dist., 66 F.3d 1535 (9th Cir. 1995), which construed "noninstructional time" under the Equal Access Act to mean the lunch period at the affected school because no instruction occurred during this set-aside time from 11:30 a.m. to 12:10 p.m. Because this time was "noninstructional," the student-initiated religious

group was entitled to the same access to classroom space for meetings as other student groups enjoyed. In Ceniceros v. Bd. of Trustees of the San Diego Unified Sch. Dist., 106 F.3d 878 (9th Cir. 1997), the 1995 opinion reported above at 66 F.3d 1535 was withdrawn in favor of the 1997 decision. The 1997 decision supersedes the 1995 decision but does not alter any of the essential determinations made in 1995.

Date

Kevin C. McDowell, General Counsel
Indiana Department of Education
Room 229, State House
Indianapolis, IN 46204-2798
(317) 232-6676
FAX: (317) 232-8004

Quarterly Report is on-line at http://ideanet.doe.state.in.us/legal/

rjr

INDEX FOR QUARTERLY REPORT
THROUGH APRIL - JUNE 1997

Legend

J-M (January-March) J-S (July-September)
A-J (April-June) O-D (October-December)